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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL ARMANDO TELLEZ,

Defendant and Appellant.

B211610

(Los Angeles County

Super. Ct. No. KA082995)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Bruce F. Marrs, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Joel Tellez was convicted, following a jury trial, of one count of forcible oral copulation in violation of Penal Code section 288a, subdivision (c)(2) and three counts of misdemeanor battery in violation of section 242. The misdemeanors were lesser included offenses of the charged offenses of sexual penetration by a foreign object in violation of section 289, forcible rape in violation of section 261 and sodomy by use of force in violation of section 286. The jury found not true the allegation that appellant used a knife in the commission of the offenses. The trial court sentenced appellant to a total term of eight years in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in excluding evidence of the victim's ex-husband's drug history, including a drug-related conviction, and in admitting portions of a nurse's report on the sexual assault examination of the victim. We affirm the judgment of conviction.

Facts

On April 23, 2008, appellant lived in a trailer in the backyard of Sacramento Salazar's house. Appellant borrowed Salazar's cell phone and called a woman with whom he had periodic physical intimacy. Salazar told appellant to meet the woman at a near-by gas station. Salazar did not want the woman to come to his house.

Later that day, Salazar heard noise coming from appellant's trailer, opened the door to investigate and saw Jane Doe, naked, orally copulating appellant. Appellant looked surprised. The woman looked embarrassed. Salazar shut the door.

Later, Salazar and his cousin Alejandro Cortez heard banging on the trailer window. The trailer door was locked and Salazar went to get the key. Doe opened the door and ran out screaming. According to Cortez, Doe looked terrified and was crying uncontrollably. She screamed that she wanted to leave and go home. She was "shaken up" and "panicking." She was not wearing shoes and her fingernails were broken. Cortez asked her what happened and she replied that appellant had kidnapped and raped her. She did not want to call the police.

Doe asked Cortez and Salazar to get her keys and cell phone from appellant so that she could go home. Salazar got the items from appellant. Appellant told Salazar that Doe had taken his "dope" and he wanted it back. Appellant was known to be using crystal methamphetamine.

Appellant tried to approach Doe. She looked scared and told Salazar and Cortez to get appellant away. Once they did so, Doe told Cortez that she had come to the trailer to help appellant move. Appellant told Salazar and Cortez: "I should have just let her go."

Cortez called Doe to make sure that she got home. Eventually, another woman answered and said: "We're not going to get the cops involved, we're going to send somebody else to take care of it."

At trial, Doe testified that she knew appellant because he had worked with her ex-husband. She went to his trailer on April 23 to help him move. Once she was inside the trailer, appellant pulled out a large knife, held it to her neck, forced her to the ground, pulled off her pants and underwear, straddled her and inserted his penis into her vagina. She did not consent. When he finished, he turned her over and inserted his penis into her anus. He then forced her to orally copulate him. He attempted to record this last act with her cell phone.

During the oral copulation, a man opened the door. She asked him to help. Appellant told him to close the door. The man closed the door. She tried to get away, but appellant grabbed her, tried to choke her and bit her on her left breast.

Later, Doe heard voices outside the trailer. She ran to the window, saw Salazar and Cortez and asked for help. The trailer door opened and she ran out and asked for help. The men got her keys and cell phone from appellant.

Doe did not call the police because appellant had threatened her life and her children's lives. On April 29, appellant came to Doe's house. She did not answer the door. That day, she reported appellant's sexual assaults to the police.

Doe admitted that she had a prior conviction for possession for sales of drugs. She denied that she went to the trailer for a drug transaction.

Nurse Sharon Durtschi performed a sexual assault examination on Doe on April 29. She observed multiple bruising on Doe's body, but no injuries to her vagina or anus. She did not find this unusual because those areas heal quickly. Nurse Durtschi found the results of her examination to be consistent with Doe's account of the rape.

Detective Mark Harvey searched appellant's trailer on May 1. He recovered a part of women's panties, a bra and a hair tie. He did not find a knife that matched Doe's description of the knife used by appellant. Detective Harvey interviewed Salazar and Cortez. They told him that Doe looked terrified when she came out of the trailer. Cortez told the detective that appellant said that he should have let Doe go and did not deny raping Doe when he was asked.

Officer Ian Galvin examined Doe's cell phone. On one of the video links on the cell phone, he heard a male Hispanic voice yell: "Hey fool, shut the door." He also heard sounds of what seemed to be a struggle.

Discussion

1. Victim's ex-husband's drug conviction

Appellant contends that the trial court abused its discretion in refusing to allow him to ask Jane Doe if her ex-husband was a drug dealer or to admit evidence that her ex-husband was in federal prison on narcotics-related convictions. He further contends that this error violated his federal constitutional right to confront witnesses, specifically to cross-examine Doe to show motive or bias. There was no abuse of discretion and no violation of appellant's federal constitutional rights.

Appellant sought to introduce the above evidence to show that Doe had a motive to go to appellant's trailer for drugs. Her ex-husband's convictions occurred in 2000, and he was in prison at the time of events in this case.

The trial court excluded the evidence under Evidence Code section 352, finding that appellant's reasons for offering the evidence involved "wild speculation." The court found that the fact that "somebody may even be involved in the narcotics industry in

some way, shape, or form, is not directly transferrable automatically, ipso facto, to a family member."

A trial court's decision to admit or exclude evidence under Evidence Code section 352 is reviewed for an abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.)

There was no abuse of discretion here. The ex-husband's conviction was eight years old, and he was currently in prison. It would not be reasonable to infer from these facts that Doe was herself a drug dealer. Thus, the evidence was irrelevant and risked confusing the jury.

There was also no violation of appellant's right to cross-examine Doe.

Undue restrictions on a criminal defendant's cross-examination of a prosecution witness may deprive a defendant of his constitutional right to confront the witnesses against him. (*Davis v. Alaska* (1974) 415 U.S. 308, 318.) "However, not every restriction of a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 946, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390.)

Cross-examination of Doe on her ex-husband's past drug-dealing would have been confusing and of marginal relevance at best. The jury would not have received a significantly different impression of Doe's credibility if appellant had been permitted to cross-examine her about her ex-husband's eight-year old drug conviction and current incarceration. (See *People v. Frye, supra*, 18 Cal.4th at p. 946 [no violation of confrontation clause unless jury might have received significantly different impression of witness credibility if excluded evidence had been admitted].)

Appellant's reliance on *Davis v. Alaska, supra*, is misplaced. In *Davis*, the restriction involved the witness's own criminal history. Here, there was no restriction on cross-examination of Doe regarding her own drug use and criminal history. The trial

court's restriction on questioning about the criminal history of a man who was not a witness in this case and not present when the charged crimes occurred is in no way comparable to the restrictions in *Davis* involving a testifying witness.

2. Nurse's report

Appellant contends that the SART report prepared by Nurse Durtschi contained hearsay statements by Doe and the trial court erred in admitting it. We see no error.

Nurse Durtschi testified as follows: "The victim told me that the suspect had asked her to help him move, and that she had come to his residence, and she had noticed that he had not packed, and that he had taken a knife that had been hidden under a jacket and had threatened her with a knife, putting the knife up to her throat. [¶] He had forced her pants down and forced her to the floor, pushing her knees against her chest, and performed vaginal sex using his penis. Following that he had turned her around, removed her clothing. After removing her shirt, bra, underwear and pants, he had then performed anal sex on her and had ejaculated. [¶] Following that, he had inserted a number of fingers into her vagina for about five minutes. And following that, he had forced her then to perform oral sex on him. And during the time when he was performing oral sex, he had on several occasions sucked and bit her breasts." This was taken directly from her report.

The trial court found the above statements admissible because they "would certainly constitute prior consistent or prior inconsistent statements. [¶] They were made at a time when the events occurred, when they were fresh in her mind. It was done for purposes of evaluation and purposes of understanding the causations, or possible causations, of the items observed by the SART nurse, and used by her to evaluate those items she observed. And obviously they will be used for potential treatment, if treatment would seem to be required."

The trial court properly admitted the statements as prior consistent statements. A witness's prior consistent statement is admissible if there is an express or implied charge that the witness's testimony at trial is "recently fabricated or is influenced by bias or other

improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Evid. Code, § 791, subd. (b).)

Appellant has not pointed to any evidence that before Ms. Doe made her statements to the SART nurse she was aware that her credibility as a witness at trial would be challenged on the grounds that her description of the incident was a fabrication. Although shortly after Ms. Doe escaped from the trailer, appellant was heard to claim that the incident was a drug deal that had gotten out of hand, there is no evidence that Ms. Doe heard the defendant's statements and no evidence that any witness told her about appellant's statements. At the time she met with the nurse, no express or implied charge had been made that her statements to the nurse had been recently fabricated or that her testimony was influenced by bias or other improper motive. It appears that her credibility was not challenged until trial when the defense suggested that her improper motive for falsely testifying was that she was a drug user and the incident was really a drug deal gone bad. Since Ms. Doe made her statement to the nurse before the improper motive was alleged to have arisen, the nurse's statement was properly admitted under Evidence Code section 791, subdivision (b).

Appellant also contends that his counsel was unable to cross-examine Doe on her statements to Nurse Durtschi because Doe testified first, and that this violated his federal constitutional right to confrontation. We see no violation. Doe's testimony was virtually identical to her statements to the nurse, and appellant was able to cross-examine her on her trial testimony. Nothing would have been added by further cross-examination of Doe on her identical out-of-court statements. Doe was recalled by the prosecution to testify about her cell phone after Nurse Durtschi had testified, but appellant made no attempt to obtain permission to cross-examine Doe at that time about her statements to Nurse Durtschi. He cannot now complain that he was unable to cross-examine her adequately. (See *Crawford v. Washington* (2004) 541 U.S. 36, 59 [Confrontation clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it].)

Even assuming for the sake of argument that the trial court had erred in admitting Doe's statements to Nurse Durtschi, and that that error was of constitutional dimensions, we would find that error harmless beyond a reasonable doubt. The only possible prejudice from those statements would have been to bolster Doe's credibility. The jury's verdict shows that even with those statements they did not find Doe credible. The jury acquitted appellant on three of the four sexual offense charges. They convicted appellant only on the oral copulation charge, which was corroborated by several sources, and similarly corroborated battery offenses. Salazar saw the oral copulation. The recording on Doe's cell phone suggested that a struggle took place after Salazar left. Cortez and Salazar described Doe as terrified when she got out of the trailer. Cortez stated that appellant acknowledged that he should have let Doe go and did not deny raping Doe when asked. Cortez noticed that Doe's fingernails were broken and Nurse Durtschi observed bruising on Doe's body.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.